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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

OLIVER McFARLINE PHILLIPS,

Plaintiff and Appellant,

v.

CITY AND COUNTY OF SAN
FRANCISCO,

Defendant and Respondent.

A125769

(City & County of San Francisco
Super. Ct. No. 472678)

Oliver McFarline Phillips appeals from the dismissal of his complaint for medical negligence, medical malpractice, and negligent infliction of emotional distress following the trial court's grant of summary judgment in favor of the City and County of San Francisco, San Francisco General Hospital, and the Tom Waddell Medical Center (collectively, the City). Phillips contends the grant of summary judgment was based on a fraudulent declaration by the City's expert. But Phillips failed to rebut the expert's declaration that stated his medical treatment met the applicable standard of care, nor did Phillips offer other admissible evidence to create a triable issue of material fact. We therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Phillips alleged that he received negligent medical care at facilities operated by the City. According to the complaint, Phillips visited Tom Wadell Medical Center (the Clinic) in July 2006 "to seek relief from an infected and severely swollen left elbow." He was told to return for an appointment three days later, but returned sooner because pus

and blood began to ooze from his elbow. He was then told he had to wait until his appointment date. When that day arrived, a nurse “blotted” and wrapped his elbow, but did nothing to aspirate “the infectuous [*sic*] fluid,” and he was discharged with instructions that the condition would heal itself in a few months. Instead, the infection allegedly spread to nerves and tendons in his left hand.

When his hand became swollen and painful, Phillips sought medical care at San Francisco General Hospital. After waiting several hours in the emergency room, he was admitted to the hospital, but was told by doctors the next morning that he had to leave “to make room for another patient.” A medical assistant “applied a small amount of topical medication,” wrapped his left elbow, and told Phillips that his left hand “would be back to normal in a couple of months.” Instead, Phillips allegedly lost the use of two of his fingers.

When Phillips sought treatment again at the hospital the following year, pus was drained from his left elbow. During that procedure, the doctor allegedly told Phillips that he should have come in sooner and, had he done so, he probably would not have lost the use of his fingers. During follow-up treatment, his wound was probed with a wood tool that caused Phillips pain, and “still to this day [Phillips] feels as if some of the stick remains in his left elbow.” X-rays were taken to determine the source of this pain, but were inconclusive. When Phillips was discharged from rehabilitation therapy, he was told it was uncertain whether his fingers “would ever get back to normal.” He also alleged that his left elbow was disfigured by a lump that resulted from the infection, that he felt “the pain of a possible foreign object left by defendants,” and that pus continued to build up in his elbow, for which he sought treatment at other medical facilities. Phillips claimed the City’s failure to provide him with proper medical treatment caused him severe emotional distress.

Phillips moved to quash and/or modify the City’s subpoenas of his medical records. The subpoenas were modified to allow the City to obtain only medical records

dated January 1, 1996, or later, and a protective order limited their disclosure to those involved in the litigation.¹

The City moved for summary judgment and submitted the declaration of an orthopedic surgeon who reviewed Phillips's medical records and opined that, contrary to Phillips's allegations, his treatment was proper and met the applicable standard of professional care. According to the declaration of the City's expert, when Phillips came to the Clinic on July 26, 2006, with "purulent type of drainage from the olecranon bursa" and a swollen left hand, reportedly following an injury by barbed wire, "the clinic providers cleaned and dressed the elbow wound, gave him a sling, gave him a prescription for antibiotics (Levofloxacin), and referred him to the emergency room." Phillips declined to go at that time.

When Phillips returned to the Clinic three days later and doctors made the same findings, he decided he would go to the emergency room at the hospital, "where he was admitted and started on intravenous antibiotics and the draining wound was incised and drained." Phillips was discharged the following day on oral antibiotics with instructions on how he should change his dressing, and "[f]ollow-up showed resolution of the problem." In June 2007, Phillips returned to the hospital with the same condition. "Again, his elbow was drained and it was documented that 10cc of puriform material was removed. There was also a large amount of granular material removed, having the appearance of uric acid crystals, which are the byproduct of gout—not infection." From the review of Phillips's medical records, it was the expert's opinion that more likely than not Phillips had gout in his elbow, and that the cellulitis in his forearm and hand were a secondary inflammation caused by gout, not an infection.

Phillips did not submit any expert declaration regarding the standard of care in opposition to summary judgment. Phillips's own declaration attached copies of treatment notes from his July 2006 visits to the Clinic and the hospital, and contended none of them

¹ Because the records were produced to the San Francisco City Attorney's Office before the hearing on the summary judgment motion, the city attorney was directed to destroy any records that predated January 1, 1996.

stated that his elbow was drained of pus at that time because if it were he “would have remembered something as critical as that”

The court granted the City’s motion for summary judgment, observing that the City had presented un rebutted expert testimony. The court denied Phillips’s oral request to amend his complaint to add an allegation of fraud, and subsequently denied his motion to file a supplemental complaint, stating “[t]he proposed complaint is untimely and fails to demonstrate compliance with the Tort Claims Act.” Phillips timely appealed from the judgment.²

DISCUSSION

We review an order granting summary judgment de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860; *Scheidt v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 69.) A defendant moving for summary judgment has the initial burden to show that a cause of action lacks merit because one or more of its elements cannot be established or it is subject to an affirmative defense. (Code Civ. Proc., § 437c, subd. (o); *Aguilar, supra*, at p. 850.) If the moving papers make a prima facie showing that justifies a judgment in the defendant’s favor, the burden shifts to the plaintiff to show the existence of a triable issue of material fact. (§ 437c, subd. (p)(2); *Aguilar, supra*, at p. 849.) We review the evidence in the light most favorable to Phillips as the party opposing summary judgment, and construe his submissions liberally while we strictly construe the City’s showing. (See *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768-769.) “However, to defeat the motion for summary judgment, the plaintiff must show ‘ “specific facts,” ’ and cannot rely upon the allegations of the pleadings.” (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 805.)

² While Phillips’s notice of appeal states that he also appeals from the order denying his motion to file a supplemental complaint, he presents no argument on that matter in his briefing and it is therefore waived. (See *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6 [“Issues not raised in an appellant’s brief are deemed waived or abandoned”].)

“The standard of care in a medical malpractice case requires that medical service providers exercise that reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of their profession under similar circumstances. The standard of care against which the acts of a medical practitioner are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of laymen.” (*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 215; accord, *Barris v. County of Los Angeles* (1999) 20 Cal.4th 101, 108 fn. 1.) “ ‘When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence.’ ” (*Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 984-985.)

The City’s expert reviewed Phillips’s medical records and opined that the treatment provided to Phillips met or exceeded the applicable standard of care. The City’s expert also stated it was more likely than not that Phillips’s symptoms were caused by gout, not an infection. Because Phillips offered no expert declaration in opposition to the motion for summary judgment, no triable issue of fact was presented regarding defendants’ compliance with the relevant medical standard of care. The only evidence was provided by the City’s expert. (See *Munro v. Regents of University of California*, *supra*, 215 Cal.App.3d at p. 984.) The summary judgment for the City must therefore be affirmed.³ (*Ibid.*)

Phillips contends that the declaration of the City’s expert was fraudulent, and failed to accurately describe the medical treatment actually provided to him. He relies heavily upon an “Operative Report” prepared by Dr. David Young at the hospital on June

³ Summary judgment was properly granted on Phillips’s causes of action for medical negligence and negligent infliction of emotional distress, as well as on his medical malpractice claim, because they are based on the same pattern of allegedly negligent conduct by the City.

1, 2007, almost a year after the events at issue here. Phillips contends Dr. Young's report supports his claim that his elbow was not incised and drained in July 2006, as Phillips infers should have been done in accord with the applicable standard of care. But Dr. Young's report begins by stating: "This is a patient who had an infection drained from his left elbow 1 year ago." Phillips's medical records thus provide the answer and refute his position.

Even if we were to assume that Dr. Young's description is inaccurate and Phillips's elbow was not "incised and drained" in July 2006, Phillips has produced no competent evidence that the applicable standard of care required such treatment, or that the failure to provide it was the proximate cause of his alleged damages approximately a year later. Phillips did not object to the City's expert testimony in the trial court, and submitted no expert declaration of his own or other admissible evidence to controvert it or demonstrate that it was fraudulent.⁴ Phillips is mistaken when he says that Dr. Young's operative report "nullifies [the City's] expert declaration and makes it void." We see no such irreconcilable conflict between the declaration and Dr. Young's report.

Nor is this a case where the alleged professional negligence involves *res ipsa loquitur* or a matter obvious to laymen. (Cf. *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001 [classic example of common knowledge exception to expert opinion requirement is an X-ray showing a scalpel left in a surgery patient's body].)⁵ Phillips's citations to a consumer health care guide are likewise

⁴ Phillips misunderstands the record when he claims the trial court agreed during the summary judgment hearing that the medical records showed the appropriate surgery was not performed. The reporter's transcript shows the court's brief comment, "Okay," constituted a simple acknowledgement of Phillips's statement, not an endorsement of its truth. Nor does the record support Phillips's assertion that the trial court later took judicial notice of the City's expert's "fabrications."

⁵ While Phillips's opening brief alludes in passing to the alleged presence of a foreign body in his elbow, he has produced no admissible evidence of such an occurrence, and even his complaint is ambiguous on this point, stating that he "feels as if some of the stick [used to clean the wound] remains in his left elbow," and referring to "a possible foreign object left by defendants"

inadequate to create a triable issue of material fact sufficient to conflict with the City's expert testimony regarding the applicable standard of care.

Phillips also seeks to support his argument with the contents of his settlement conference statement, attached as an exhibit to his declaration in opposition to summary judgment. But the settlement conference statement suffers from the same infirmity as the other evidence Phillips relies upon to prove negligence—it is not expert testimony tied to the standard of care. (See *Munro v. Regents of University of California*, *supra*, 215 Cal.App.3d at p. 984.) Moreover, statements made during mediation proceedings are not admissible evidence. (Evid. Code, § 1119.)

Phillips further claims the City improperly acquired medical records that are unrelated to this litigation, but he does not claim to have appealed the trial court's ruling on his motion to quash and/or modify the City's subpoena of those records. Moreover, he did not raise evidentiary objections on the basis of this alleged impropriety in his opposition to the motion for summary judgment, nor has he shown that he was prejudiced by the alleged error. Phillips's allegations that the trial court "abandoned [the] role of neutral arbiter" are also unsupported. While Phillips contends that a statement made by the trial judge shows that his medical records "were not considered as substantive issues in determining if [his] case has merit," the comment to which he refers occurred during a January 2009 hearing after summary judgment had already been granted for the City. In sum, Phillips has not shown on appeal that the entry of summary judgment for the City was improper.

DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.